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DONALD C. BREY

December 17, 1997

Jennifer H. Boyt, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: MUR 4687 -- Voinovich for Senate Committee and
Vincent M. Panichi, as Treasurer

Dear Ms. Boyt:

By and through the undersigned counsel, the Respondents hereby answer the complaint in the above-captioned matter, filed by the General Counsel of the Democratic Senatorial Campaign Committee. As demonstrated below, the complaint is inaccurate in its facts, frivolous as a matter of law under the precedents established by the Federal Election Commission ("Commission") and should be dismissed.

FACTUAL BACKGROUND

The DSCC's assertion that the Issue 2 "Keep Ohio Working" campaign was part of a "plan" "devised" by Mr. Voinovich to promote his 1998 U.S. Senate campaign is utter nonsense. The issue campaign was put on the Ohio ballot by those who *opposed* legislation supported by and signed into law by Governor Voinovich.

As Governor of Ohio, Mr. Voinovich supported an overhaul of Ohio's workers compensation system. This was a key legislative priority of the Voinovich administration, and resulted in the passage of Senate Bill 45 by the Ohio General Assembly. Governor Voinovich signed this workers compensation bill on April 22, 1997. Senate Bill 45 would have gone into effect ninety days later, on July 22, 1997, but the opponents of this element of Governor Voinovich's legislative agenda initiated a state-wide referendum to challenge this law pursuant to Ohio Constitution Article II, §1c.

By filing the referendum petition, the opponents of Senate Bill 45 stayed its effective date and transformed Senate Bill 45 into State Issue 2 on the November, 1997, ballot. Under

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Ohio election law, the supporters of the legislation passed by the general assembly were to vote "yes", while the opponents, who caused the issue to be placed on the ballot, were to vote "no". Thus, *all* advertisements in support of the general assembly's workers compensation legislation asked voters to vote "yes" on Issue 2.

According to the *Almanac of American Politics*: "In early 1997 George Voinovich stood at the summit of Ohio politics, in his seventh year as Governor with very high job approval...." at p. 1099. In his second term as Governor of Ohio, the former lieutenant governor, 10-year mayor of the state's largest city and former member of the Ohio Legislature is unquestionably the state's leading elected official and political leader, wholly apart from the fact that he supported and signed the legislation that was challenged in the Issue 2 election.

The "Keep Ohio Working" Committee was a separate committee, with its own offices, own officers and own treasurer. Governor Voinovich did not ask to appear in "Keep Ohio Working" advertisements. Governor Voinovich appeared in "Keep Ohio Working" advertisements *at their request* - not his. Since Issue 2 was purely a state issue, voted on only by Ohio electors, obviously advertisements would only air in the state of Ohio.

In filing the complaint, the Democratic Senatorial Campaign Committee's general counsel contends these 1997 advertisements somehow represent impermissible federal activity, even though they do not identify or mention Governor Voinovich as a candidate for any office, do not solicit funds for any purpose (especially *not* for Governor Voinovich's 1998 Senate candidacy) and contain no electioneering message for any candidate, including Governor Voinovich. Transcripts of the ads are attached as Exhibits A and B.

The complaint further fails to mention that Issue 2, as the ballot measure was called, was not popular. It was defeated in the November 1997 election by a 57% to 43% margin, so any claims of political gain for Governor Voinovich are speculative, at best. Moreover, as Governor of the state, and a prominent supporter of Senate Bill 45, Mr. Voinovich would have been conspicuous by his absence had he not been heavily involved in this important state issue.

LAW

In a series of Advisory Opinions, the Commission has frequently considered whether particular activities involving the participation of a federal candidate, or communications referring to a federal candidate, result in a contribution to or expenditure on behalf of that candidate. Specifically, the Commission has ruled that contributions or expenditures do not

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result when a candidate serves as chairperson of a political, charitable or issue advocacy organization, AO 1978-5, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5299 (1978); AO 1978-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5304 (1977); AO 1977-54, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5301 (1978), a candidate appears endorsing a candidate for local office in television advertisements, AO 1982-56, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5695,¹ or a candidate appears as a speaker in a college speakers program, AO 1992-6, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6043 (1992).

Furthermore, the Commission has permitted a candidate for federal office to form a state committee in the same election cycle as he is seeking federal office to raise funds and contribute to candidates for state and local campaigns. AO 1985-38, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5839 (1986). The Commission further permitted the federal candidate to use his name in the name of the state committee. *Id.*

Critically, the Commission has previously recognized "the distinction between a candidate-related 'election to any political office,' as used in 2 U.S.C. § 441e and other provisions of the Federal Election Campaign Act ("Act"), and issue-related ballot initiatives. The Commission has stated that contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act. AO 1989-32, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5989 at 11,629 (1990), citing AO 1984-62 n.2, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5813 (1984); AO 1980-95, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5547 (1980).²

¹In Advisory Opinion 1982-56, the Commission concluded that a Congressman on the ballot could appear in television advertisements endorsing a candidate for local office in the same election in which the Congressman was a candidate without it constituting a contribution or expenditure for the federal candidate. In the advertisement, the Congressman/ candidate appeared for 7 seconds in a 30 second ad and stated: "I think Ann Delaney is one of the best courtroom prosecutors we've ever had in this country." The Commission noted that the purpose of the advertisement was to endorse and influence the local election, and that the ad itself did not mention the federal candidate's campaign for re-election and, therefore, did not impact any federal election.

²Other advisory opinions have permitted appearances in publicly broadcast programs, AO 1992-5, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6049 (1992) (Congressman may participate in public affairs forums televised on local cable channels within his district since there was to be no mention of the Congressman's campaign, nor any solicitation of funds); AO 1990-5, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5982 (1990) (Congressional candidate's issue-oriented non-partisan newsletter, funded by the candidate, would only trigger expenditures under the Act if (1) direct or indirect reference was made to the candidacy, campaign or qualifications for public office of either candidate; (2) articles or editorials were published referring to the views of the candidates or issues raised in the campaign; or (3) distribution of the newsletter was expanded in a manner that indicated utilization of the newsletter as a campaign communication.); AO 1977-54, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5301 (Congressman/candidate could

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In an enforcement matter strikingly similar to the instant case - including the fact it was filed by the Democratic Party - the Commission voted to dismiss a complaint against a Republican leader advocating a position on a state ballot issue. In MUR 4563, the Commission on December 15, 1997, closed its file on a complaint alleging that Senator Alphonse D'Amato's 1998 Committee had improperly used "soft money" to aid his federal candidacy. Like this matter, the complaint involved television advertisements for a state ballot issue.

Consistent with its decision in MUR 4563, the Commission has determined that such activities can result in a contribution or expenditure under the Act only if the activities involve: (1) the solicitation, making or acceptance of contributions to the candidate's campaign, or (2) communications expressly advocating the nomination, election or defeat of any candidate. AO 1994-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6118 (1994) (citations omitted). Thus, contributions can only result when the purpose and message of the ad or activity is influencing the election of a candidate for office. See AO 1990-5, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5982 (1990). Factors cited in determining that the activity did result in contributions or expenditures under the Act include: the political committee is actively engaged in making contributions or expenditures on behalf of candidates; the content of the ads made reference to the candidate's previous election to the office and the voters' role in electing a praiseworthy officeholder; the ads were run just prior to the election in which the candidate mentioned was on the ballot; and "the activity in question did not appear to have any specific and significant non-election related aspects that might distinguish it from election influencing activity." *Id.* at 11,611.³

participate in a statewide petition drive, funded by public contributions, to stop ratification of the Panama Canal Treaty without triggering the Act's contribution/expenditure provisions, even though Congressman/candidate's name appeared on all mailings, in newsletters, and in news stories); see also AO 1980-25, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5481 (letter writing campaign in opposition to a state initiative); AO 1978-88, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5377 (participation in public service announcements to raise money for diabetes research); AO 1978-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5304 (participation in cancer society fundraising campaign); AO 1977-42, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5313 (participation in issue-oriented radio program).

³The Commission has found the Act's contribution and expenditure provisions triggered when a PAC proposed producing and broadcasting a series of 30-second ads congratulating voters from certain states for electing certain Senators who maintained certain voting records during their term. AO 1983-12. In reaching this conclusion, the Commission noted that "the spots include eight verbal references to the State represented by the Senator and make explicit, complimentary comments congratulating the electorates in those states for electing the Senator in a prior election. The fact of a previous election is mentioned three times. These specific references to the Senator's identity, home state, past election, and commendable service to the state are in marked contrast to the cryptic, generalized mention of issues that occurs in the spots." Moreover, the Commission found that "the activity in question does not appear to have specific

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DISCUSSION

Under the rulings of the Commission, this complaint must be dismissed. The ads at issue support an Ohio workers' compensation reform issue one year away from any federal election in the state. It received bi-partisan support and bi-partisan opposition. The Commission has recognized that contributions to or expenditures by issue-related ballot questions (as compared to elections to federal office), do not fall under the Act. AOs 1989-32, 1980-95; *see also* MUR 4563.

Governor Voinovich had every right to appear in two of the ads supporting Issue 2. As the Commission has made clear, but complainants do not wish to accept, this does not constitute a contribution or disbursement under the Act or the Commission's regulations. *See, e.g.,* AO 1982-56.

Under the standard set by the Commission's advisory opinions, this matter must be dismissed since an examination of the ads demonstrates that they:

- contain no electioneering message for Governor Voinovich for any race;
- there is no communication advocating the election or defeat of Governor Voinovich, or any other candidate;
- the ads do not discuss in any way the 1998 election campaign about which the DSCC complains;
- there is no attempt to solicit contributions for Governor Voinovich or any other federal candidate or committee.

Governor Voinovich was requested to appear in the ads because, as the Governor who signed the legislation subject to the referendum and as a leading figure in Ohio, "Keep Ohio Working" believed that he could influence a large number of votes for a ballot measure. Unlike the public service messages that were the subject of Advisory Opinion 1977-31 (cited in the complaint), at issue here are ads specifically supporting a state ballot measure and not, in the words of the complaint "60-second radio spots read by [a] prospective candidate which

and significant non-election related aspects that might distinguish it from election influencing activity." *See also,* AO 1977-31, Fed. Elec. Camp. Fin. Guide (CCH) § 5262 (public messages read by candidate and sponsored by corporation would constitute a contribution to the candidate).

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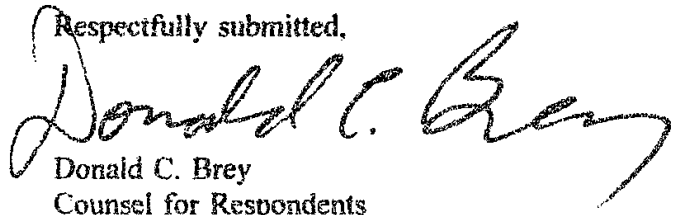
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... presented political opinions on a wide range of topics." As in Advisory Opinion 1992-37 (upon which the complaint somehow purports to rely), Governor Voinovich avoided advocacy of any candidate's (including his own) election or defeat. See MUR 4563.

Furthermore, the complaint erroneously insinuates that the ads were merely a "vehicle" used by Voinovich for Senate in some "plan to attract soft money to his personal political use." Long on partisan hyperbole but short on pertinent facts, the complaint can only point to the innocuous for support: that Governor Voinovich is a candidate (not mentioning that the senatorial election was more than a year after the date of the complaint), and that the ads were aired in Ohio and include his appearance (after all, he is the Governor of *Ohio*, and the ballot measure was in *Ohio*; thus, AO 1977-54, cited in the complaint, is contradictory, since the ads would not be relevant anywhere else but *Ohio*). George V. Voinovich is Ohio's Governor and, as such, he has the right and the duty to continue to speak out on issues of the state - particularly state legislative issues. In fact, Governor Voinovich had "been beating the drum relentlessly" for the passage of Issue 2 (and previously for the legislation that was the subject of Issue 2) in his role as an Ohio leader. See Exhibit A to Complaint.

The complaint's rhetorical flourishes betray its true purpose: to recruit improperly the Commission's power to oppose Governor Voinovich politically. The Commission ought not become a party to such a clearly partisan effort. This complaint should be dismissed since the 1997 ads at issue featuring Governor Voinovich discuss a state issue, do not even mention a federal election, and are about a state referendum and not a federal campaign.

Respectfully submitted,


Donald C. Brey
Counsel for Respondents

"Yes on Issue 2"

Visual: Yes on Issue 2 - Fix Workers' Comp.

Paid for by Keep Ohio Working, Roger R. Geiger, Treas, 236 E. Town St, Suite
110, Columbus, Ohio, 43215

**"Issue 2 stops cheaters who fake injuries, punishes businesses that don't pay, and limits
lawyers who made 200 million off injured workers last year alone."**

Visual: Cheaters/Fraud/Lawyers

"Workers' Comp is broken"

"Voting yes on Issue 2 will fix it"

Visual: Vote Yes on Issue 2

"That's why there is so much support to vote yes on Issue 2"

Visual: The Vindicator
The Cincinnati Enquirer
The Plain Dealer
The Columbus Dispatch

"Ohio's leading newspapers"

"Ohio's doctors"

"The Ohio Farm Bureau"

"Ohio's manufacturers"

"The Ohio Chamber"

"Ohio's small businesses and Governor George Voinovich"

GOVERNOR VOINOVICH: "Vote yes on Issue 2"

ISSUE 2 AD (10/27/97)

(Visual: Voinovich standing in office in front of American flag, book shelf and desk chair. Chyron: Gov. George Voinovich)

(Audio: Voinovich speaking)

The Plain Dealer said the opponents of Issue 2 would use scare tactics. (Holds up a Plain Dealer. Chyron: "Scare tactics"—The Plain Dealer) Have they ever!

Here's what Issue 2 really does: Voting yes on Issue 2 helps injured workers. (Chyron: Issue 2 Helping Injured Workers)

Medical and lost time benefits are not cut as the lawyers would have you believe. (Chyron: Medical Benefits are NOT Cut—Senate Bill 45, 4/22/97)

Full benefits will be paid faster. (Chyron: Benefits Paid Faster—S.B. 45, 4123.56(B)(1))

Carpal tunnel is still covered (Chyron: Carpal Tunnel IS Covered—S.B. 45, 4123.01(F))

And you keep the choice of doctors that take care of you. (Visuals: Two doctors looking at X-rays. Chyron: Keep Choice of Doctors—Ohio Administrative Code 4123.6.082)

(Visual: Voinovich in office. Blue campaign button appears on screen next to Voinovich, reading Vote YES on Issue 2)

So let's take the money from the Workers' Comp lawyers and put it in the pockets of the injured workers where it belongs. Fix Workers' Comp. Vote yes on Issue 2.

(Disclaimer: Paid for by Keep Ohio Working, Roger R. Gelger, Treas., 238 E. Town St., Suite 110, Columbus, Ohio 43215)